



RESPONSE TO THE DEFRAWELSH GOVERNMENT CONSULTATION ON THE REVISED WASTE DUTY OF CARE CODE OF PRACTICE, SEPTEMBER 2015

1. The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.
2. UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the Waste Working Party and the Wales Working Party.
3. UKELA welcomes the opportunity to comment on the revised Waste Duty of Care Code of Practice and makes the following comments on the proposals.

GENERAL COMMENTS

4. Overall, UKELA feels that the revised Waste Duty of Care Code of Practice is a very poor document that is too complicated for basic users and of little practical use to professional and technical users. UKELA is disappointed that the real, unstated purpose of revising the Waste Duty of Care Code of Practice seems to have been to produce an abbreviated guidance document for the sake of having a shorter document, rather than to produce a genuine updated version of the 1996 Code of Practice. The 1996 Code of Practice has stood the test of time well and is actually useful to users. UKELA is concerned that the revised Code of Practice will undermine the whole basis of the Waste Duty of Care.

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5. The legal basis and purpose of the Code of Practice is set out in Section 34(10) of the Environmental Protection Act 1990 (EPA 1990), which provides that it shall be admissible in evidence and that if any provision of the Code of Practice appears to the Court to be relevant to any question arising in the proceedings, then it shall be taken into account in determining that question. UKELA's view is that the revised Code of Practice will offer little, if any, assistance to magistrates or juries attempting to assess compliance with the Waste Duty of Care.
6. UKELA also notes that the Northern Ireland Environment Agency produced a Waste Duty of Care Code of Practice in July 2014, which is based on the 1996 Code of Practice. UKELA suggests that the Northern Ireland Code of Practice is a far more useful document than the revised Code of Practice for England and Wales, and urges Defra and the Welsh Government to reconsider the Code of Practice for England and Wales.
7. UKELA would be pleased to meet Defra and Welsh Government officials to talk through these concerns and suggestions, as well as any of the more detailed points below.
8. UKELA has the following specific comments on section 1 ("*Overview*") of the revised Code of Practice:
 - a. The first sentence should include the words "broker in, deal in".
 - b. In the second sentence of the second paragraph, it should be made clear that those operating in England and Wales who also work in Scotland and Northern Ireland should take account of the respective codes of practice of those jurisdictions. It is not evident who "you" refers to. The word "also" should be inserted between "should" and "take account".

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- c. In the third paragraph, UKELA suggests that the regulators in Scotland and Northern Ireland should be specified.

RESPONSE TO CONSULTATION QUESTIONS

Q1. DOES THE REVISED CODE OF PRACTICE CLEARLY SET OUT THE SCOPE OF THE DUTY OF CARE REQUIREMENTS UNDER SECTION 34 OF THE EPA?

9. UKELA believes that the scope of the duty of care requirements is not clearly set out in the revised Code of Practice. In sub-section 2.1 (*“Waste the duty applies to”*):

- (a) There should be a statement to the effect that householder responsibilities are different.
- (b) The legal definition of waste guidance referred to is a lengthy and complex document. UKELA suggests that it would be more helpful to provide a brief summary of the legal definition of waste in the Code of Practice and to refer to the legal definition of waste guidance for more in-depth guidance.
- (c) in the final paragraph there should be a link to the separate duty of care for minerals extraction.

10. In sub-section 2.2 (*“Who the duty applies to”*):

- (a) There should be clarification in the *“waste producer”* bullet point on the position of householders. The Code of Practice is not targeted at them. UKELA suggests that there should be responsibility on carriers, dealers and brokers, etc to educate householders about their duty of care responsibilities.
- (b) It is not clear from the document whether producer responsibility schemes are *“brokers”*. WEEE producer compliance schemes are

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generally considered to be brokers, but not packaging waste producer compliance schemes; this should be explained in the document.

- (c) Waste carriers are not just those that transport waste "in the course of business or with a view to profit". Local authorities and other public sector organisations may also be waste carriers.
- (d) The “dealer” bullet point includes a reference to an “agent”. The revised Code of Practice should explain what an agent is in this context and explain what an agent’s responsibilities (if any) are in terms of the Waste Duty of Care.
- (e) It cannot be that any person involved in **any** action that a broker or dealer takes is automatically a waste manager. UKELA suggests that the text at the end of the “*waste manager*” bullet point be amended to say “...any waste management action a broker or dealer takes” (additional wording underlined).
- (f) The definitions of “treatment”, “recovery” and “disposal” appear to be out of context. They do not relate to the sub-heading “*Who the duty applies to*” and there is a lack of explanation of why it is necessary to include these definitions.

Q2. DOES THE REVISED CODE OF PRACTICE HELP YOU TO UNDERSTAND HOW LONG THE DUTY OF CARE APPLIES FOR?

- 11. No. The contents of sub-section 2.3 (“*How long your duty of care lasts*”) do not accurately reflect its heading. The contents are more about responsibility to ensure that waste is disposed of appropriately and duplicate the points made in the previous sub-section (2.2).

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Q3. DOES THE REVISED CODE OF PRACTICE CLEARLY EXPLAIN WHAT THE LEGISLATIVE REQUIREMENTS OF THE DUTY OF CARE ARE?

12. Although there is a brief mention of Section 34 of the EPA 1990 in section 1 of the revised Code of Practice, there is no mention of it in section 3. Overall, UKELA believes that the whole of section 3 is very muddled and fails to separate the requirements for hazardous and non-hazardous waste. In trying to provide simple, high-level guidance the revised Code of Practice makes it very difficult for waste producers to understand what they need to do to comply with the Waste Duty of Care. Section 3 contains no mention of the European Waste Catalogue Codes and only makes a passing reference to the waste hierarchy, which is supposed to be the foundation of resource efficiency. The section also gives no indication of who has what responsibilities for transfer documentation when dealing through waste brokers.
13. In terms of specific comments on section 3:
- (a) The words “in the circumstances” at the start of the section are superfluous. UKELA suggests amending the first sentence to read “If you are a holder of controlled waste, you must take all reasonable steps in the management of your waste to” (additional wording underlined).
 - (b) The bullet point “*provide an accurate description of the waste when it is transferred to another person*” suggests that the requirements only apply to the written description of waste. This is misleading and the text should refer to the need to have a record of the transfer that contains the legally required information as well as the description of the waste. Although the producer has the legal responsibility to

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ensure that the description is correct, the main requirement is to have documentation containing a description of the waste.

- (c) The third bullet point in sub-section 3.5 seems out of place. UKELA suggests that it would be more logical to refer to the retention of documentation after all the other points as a separate sub-section 3.6.
- (d) The link “basic characterisation” in the list of bullet points in sub-section 3.5 towards the end of page 8 directs to <http://www.legislation.gov.uk/ukpga/1990/43/section/33>, which does not seem correct (quite apart from the fact that the version of the EPA 1990 on www.legislation.gov.uk is not up to date and does not reflect key changes to Section 34, such as those made by the Waste (England and Wales) Regulations 2011 (SI 2011/988)). Also, the requirement for the pre-treatment or removal of certain wastes prior to landfill disposal are requirements of the EU Landfill Directive and are confirmed in basic characterisation information, rather than being required to meet basic characterisation requirements. The same sub-section should make explicit reference to the requirement to provide “basic characterisation” information for wastes destined for landfill disposal, with reference to where these requirements are set out (i.e. Council Decision 2003/33/EC). The bullet points included at the end of page 8 of the revised Code of Practice do not include all information required for basic characterisation.

Q4. DO YOU HAVE ANY COMMENTS TO SUPPORT YOUR ANSWER TO QUESTIONS 1-3?

- 14. Please see the above comments.

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Q5. DOES THE REVISED CODE OF PRACTICE HELP YOU TO UNDERSTAND WHAT ACTIONS YOU NEED TO TAKE TO MEET YOUR DUTY OF CARE?

15. No - please see the comments above in response to questions 1-3. UKELA suggests that the Northern Ireland Environment Agency's Waste Duty of Care Code of Practice provides far better guidance to those with Waste Duty of Care responsibilities than the revised Code of Practice for England and Wales.

Q6. DO YOU HAVE ANY COMMENTS TO SUPPORT YOUR ANSWER TO Q5?

16. Please see the above comments.

Q7. IS THE SIGNPOSTING OF OTHER RELEVANT LEGISLATIVE REQUIREMENTS IN SECTION 4 USEFUL?

17. Section 4 seems to try to wrap up a number of different areas in one very brief section, which only serves to complicate the document. For example, it suggests that all materials recovery facilities "must" carry out certain requirements, when those requirements do not apply to all such facilities. The sub-bullet points on the collection of paper, metal, plastic and glass appear to duplicate each other and the final bullet point on the import and export of waste fails to mention that the trans-frontier shipment of waste rules are mandatory and must be complied with.

Q8. DO YOU HAVE ANY COMMENTS TO SUPPORT YOUR ANSWER TO Q7?

18. Please see the response to question 7.

Q9. HOW DO YOU PLAN TO USE THE REVISED CODE OF PRACTICE – WILL YOU PRINT IT AS A HARD COPY OR ARE YOU MORE LIKELY TO ACCESS IT ONLINE?

19. UKELA's membership is broad and its members are likely to use the revised Code of Practice in both those ways. In addition, the document should be

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available in PDF format rather than just HTML. Not all parts of England and Wales are served by reliable or fast internet connections and therefore users may prefer to download the document, either to view it electronically offline, or to print it. A PDF document can also be annotated electronically, or printed and marked up as required by the user.

Q10. DO YOU HAVE ANY SUGGESTIONS REGARDING HOW TO ENSURE THAT THE FORMAT OF THE REVISED CODE OF PRACTICE BEST MEETS YOUR NEEDS?

20. UKELA refers to its comments above regarding the Northern Ireland Code of Practice and proposes that document as a better format for a revised Code of Practice for England and Wales.
21. The use of hyperlinks to other guidance and legislation may be problematic in time, as such links may not be updated when required. UKELA members have encountered particular problems locating hyperlinked documents following the migration of the Environment Agency's website to the gov.uk website. As a minimum, the revised Code of Practice should contain a reference list (for example, in an Annex or Appendix), so that if a hyperlink breaks the user can attempt to locate a copy of the relevant document.
22. In addition, the date and place of publication, the version number and amendment history should be set out in the revised Code of Practice, so that it can be accurately referenced. This is particularly important given the legal status of the revised Code of Practice – if the document is to be used as evidence in proceedings, then it is vital that the correct version of the document (i.e. the version in force on the date of the alleged offence) is used.

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